IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

CLAY ANTHONY FORD — PETITIONER

vs. NO. 82 5378

STATE OF ARKANSAS — RESPONDENT

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

The petitioner, a prisoner under sentence of death, petitions for a writ of certiorari to review the denial by the Supreme Court of Arkansas of his direct appeal from his conviction.

QUESTIONS PRESENTED

1. Whether the right of the petitioner to a fair trial as guaranteed by the Sixth and Fourteenth Amendments was abridged by the introduction during the guilt phase of evidence of prior criminal convictions.

2. Whether the right of the petitioner, a black, to a fair trial as guaranteed by the Sixth and Fourteenth Amendments and his right to equal protection of the laws as guaranteed by the Fourteenth Amendment were abridged by the selection of his jury from a panel that did not reflect a cross section of the community and had a gross underrepresentation of blacks.

3. Whether the right of the petitioner to a fair trial as guaranteed by the Sixth and Fourteenth Amendments was abridged by the introduction into evidence during the penalty phase of evidence of prior convictions, that admission admittedly being in contravention of the state statute prescribing what evidence is admissible during the penalty phase.

4. Whether the right of the petitioner, a black, to equal protection of the law as guaranteed by the Fourteenth Amendment and his right not to be subjected to cruel and unusual punishment as guaranteed by the Eighth and Fourteenth

Amendments were abridged by the operation of a criminal justice system that results in the sentencing of a disproportionate number of blacks to the death penalty.

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OPINION BELOW

The opinion of the Supreme Court of Arkansas is cited as Ford vs. State, 276 Ark. 98, 663 S.W.2d 3 (1982).

JURISDICTION STATEMENT

The opinion of the Supreme Court of Arkansas denying the direct appeal of the petitioner was rendered on May 10, 1982. A petition for rehearing was denied on June 7, 1982. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1257(3), with the petitioner asserting a deprivation of rights as secured by the United States Constitution.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Sixth Amendment, United States Constitution:

> In all criminal prosecutions, the accused still enjoy the right to a . . . trial, by an impartial jury . . .

Eighth Amendment, United States Consititution:

> Excessive bail should not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Fourteenth Amendment, United States Constitution:

> [Nor] shall any State deprive any person of life, liberty, or property, without due process applaude; nor deny to any person within its jurisdiction the equal protection of the laws.

Ark. Stat. Ann.:

> Sec. 41-1301. Trial of persons charged with capital murder. - The following procedures shall govern trials of persons charged iwth capital murder:
>
> (1) The jury shall first hear all evidence relevant to the charge or charges and shall then retire to reach a verdict of guilt or innocence.
>
> (2) If the defendant is found not guilty of the capital offense charged, but guilty of a lesser included offence, sentence shall be determined and imposed as provided by law.
>
> (3) If the defendant is found guilty of capital murder, the same jury shall sit again in order to hear additional evidence as provided by subsection (4) hereof, and to determine sentence in the manner provided by section 1302 [Sec. 41-1302]; except that,

if the state waives the death penalty, stipulates that no aggravating circumstance exists, or stipulates that mitigating circumstances outweigh aggravating circumstances, no such hearing shall be required, and the trial court shall sentence the defendant to life imprisonment without parole.

(4) In determining sentence, evidence may be presented to the jury as to any matters relating to aggravating circumstances enumerated in section 1303 [Sec. 41-1303], or any mitigating circumstances. Evidence as to any mitigating circumstances may be presented by either the state or the defendant regardless of its admissibility under the rules governing admission of evidence in trials of criminal matters; but the admissibility of evidence relevant to the aggravating circumstances set forth in section 1303 [Sec. 41-1301] shall be governed by the rules governing the admission of evidence in such trials. The state and the defendant or his counsel shall be permitted to present argument respecting sentencing.

41-1302. Findings required for death sentence = Unanimity required. -

(1) The jury shall impose a sentence of death if it unanimously returns written findings that:

(a) aggravating circumstances exist beyond a reasonable doubt; and

(b) aggravating circumstances outweight [outweigh] beyond a reasonable doubt all mitigating circumstances found to exist; and

(c) aggravating circumstances justify a sentence of death beyond a reasonable doubt.

(2) The jury shall impose a sentence of life imprisonment without parole if it finds that:

(a) aggravating circumstances do not exist beyond a reasonable doubt, or

(b) aggravating circumstances do not outweight (outweigh) beyond a reasonable doubt all mitigating circumstances found to exist; or

(c) aggravating circumstances do not justify a sentence of death beyond a reasonable doubt.

(3) If the jury does not make all findings required by subsection (1), the court shall impose a sentence of life imprisonment without parole.

41-1303. Aggravating circumstances. - Aggravating circumstances shall be limited to the following:

(1) the capital murder was committed by a person imprisoned as a result of a felony conviction;

(2) the capital murder was committed by aperson unlawfully at liberty after being sentenced to imprisonment as a result of a felony conviction;

(3) the person previously committed another person or creating a substantial risk of death or serious physical injury to another person;

(4) the person in the commissin of the capital

murder knowingly created a great risk of death to a persn other than the victim;

(5) the capital murder was committed for the purpose of avoiding or preventing an arrest or effecting an escape from custody;

(6) the capital murder was committed for pecuniary gain; or

(7) the capital murder was committed for the purpose of disrupting or hindering the lawful exercise of any government or political function.

41-1304. Mitigating circumstances. - Mitigating circumstances shall include, but are not limited to the following:

(1) the capital murder was committed while the defendant was under extreme mental or emotional disturbance;

(2) the capital murder was committed while the defendant was acting under unusual pressures or influences or under the domination of another person;

(3) the capital murder was committed while the capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, intoxication, or drug abuse;

(4) the youth of the defendant at the time of the commission of the capital murder;

(5) the capital murder was committed by another person and the defendant was an accomplice and his participation relatively minor;

(6) the defendant has no significant history of prior criminal activity.

41-1501. Capital murder. (1) A person commits capital murder if:

(a) acting alone or with one or more other persons, he commits or attempts to commit rape, kidnapping, arson, vehicular piracy, robbery, burglary, or escape in the first degree, and in the course of and in furtherance of the felony, or in immediate flight therefrom, he or an accomplice causes the death of any person under circumstances manifesting extreme indifference to the value of human life; or

(b) with the premeditated and deliberate purpose of causing the death of any law enforcement officer, jailer, prison official, fireman, judge or other court official, probation officer, parole officer, or any military personnel, when such person is acting in line of duty, he causes the death of any person.

STATEMENT OF THE CASE

Clay Anthony Ford was convicted of capital felony murder in the Mississippi County, Arkansas, Circuit Court and sentenced to death by electrocution. He appealed that judgment and sentence to the Supreme Court of Arkansas, which affirmed the judgment and sentence on May 10, 1982. Ford vs. State, 276 Ark. 98, 663 S.W.2d 3 (1982). A petition for rehearing was denied by the Arkansas Supreme Court on June 7, 1982.

Ford is black. All of the members of the jury that convicted and sentenced him are white. The panel from which the jury was drawn included only five or six blacks. The state excluded all of them by exercising challenges for cause or peremptory challenges. The trial judge granted exclusions from jury service to a number of persons who were summoned for jury duty. Those exclusions were granted by the trial judge in advance of the trial. No efforts were made to insure that the jury was drawn from a panel that reflected a cross section of the community. Inadmissible evidence about prior convictions was admitted during the guilt and penalty phases of the trial. The petitioner has raised in this petition issues concerning the makeup of the jury panel and the jury, the admission of inadmissible evidence, and the sentencing of blacks to the death penalty in numbers that are unconstitutionally disproportionate to their percentage of the total population.

REASONS FOR GRANTING THE WRIT

1. Whether the right of the petitioner to a fair trial as guaranteed by the Sixth and Fourteenth Amendments was abridged by the introduction during the guilt phase of evidence of prior criminal convictions.

The Sixth Amendment, which applies to the states through the Fourteenth Amendment, guarantees a criminal defendant a fair trial. Clay Ford's right to a fair trial was abridged in this case by the introduction during the guilt phase of evidence of prior criminal convictions.

Ford was charged with capital murder under Ark. Stat. Ann. Sec. 41-1501(1)(a) and (b). Subsection (1)(a) states that a person commits capital murder if, among other things, he causes the death of any person under circumstances manifesting extreme indifference to the value of human life while in the course of or in furtherance of escape in the first degree. Subsection (1)(b) provides that a person commits capital felony murder if he causes the death of a law enforcement officer with the premeditated and deliberate purpose of commiting the death while the officer is acting in the line of duty. Ford was charged with having killed an officer of the Arkansas State Police who was trying to apprehend him at the end of a high-speed chase. Ford was an escapee from the Tennessee Department of Correction, where he had been serving time for felony convictions.

To prove that the killing occurred during the furtherance of first degree escape, the state needed to show only that Ford was an escapee from an institution where he had been serving time for felony convictions. That showing would have brought the charge within the purview of Ark. Stat. Ann. Sec. 41-1501 (1)(a).

The State was not satisfied with making that showing. In addition, it sought and was permitted to prove what crimes Ford was serving time for. The admission of that evidence violated the rule forbidding the prosecution from proving the commission

of one crime by proof of the commission of another. Alford v. State, 223 Ark. 330, 266 S.W.2d 804 (1954). In that case the Arkansas Supreme Court said that it would not permit the State to adduce evidence of other offenses for the purpose of persuading the jury that the accused is a criminal and therefore likely to be guilty of the charge under investigation. It said that proof of other crimes should never be admitted when its only relevancy is to show that the prisoner is a man of bad character, addicted to crime. The state was permitted in this case to attempt to convict Ford by proving that he had been a criminal in the past. The error was pointed out by the Associate Justice of the Arkansas Supreme Court who dissented from the holding of the Court. 276 Ark. 115.

The introduction of the evidence of prior convictions prevented Clay Ford from receiving the fair trial guaranteed to him by the Sixth and Fourteenth Amendments.

2. Whether the right of the petitioner, a black, to a fair trial as guaranteed by the Sixth and Fourteenth Amendments and his right to equal protection of the law as guaranteed by the Fourteenth Amendment were abridged by the selection of his jury from a panel that did not reflect a cross section of the community and had a gross underrepresentation of blacks.

Clay Ford is black. According to the Advance Report of the 1980 Census, 27.15 per cent of the population of Mississippi County, where Ford was tried, was black. The names of 303 prospective jurors were drawn prior to the trial. The trial judge excused 163 persons from that group. The judge attempted to have 150 jurors summoned for the first day of the trial. Only 54 appeared. Of that number five or six were black. All of the blacks were excused either for cause by the trial judge or were premptorily challenged by the state.

Systematic disproportion in juries and jury panels demonstrates an infringement of a defendant's interest in a jury chosen from a fair community cross section. In this case

there is no adequate justification for the disproportionate departure from the cross section. Duren v. Missouri, 439 U.S. 357 (1979).

3. Whether the right of the petitioner to a fair trial as guaranteed by the Sixth and Fourteenth Amendment was abridged by the introduction into evidence during the penalty phase of evidence of prior convictions, that admission admittedly being in contravention of the state statute prescribing what evidence is admissible during the penalty phase.

Ark. Stat. Ann. Secs. 41-1301 - 1304 set forth the procedure to be followed in trying a person charged with capital murder. If the defendant is found guilty of the capital offense charged, the same jury sits again to hear additional evidence to determine whether he shall be sentenced to execution or life in prison without parole. The state is permitted to introduce evidence about any of seven specific aggravating circumstances. The defendant is permitted to offer evidence about any of six specific mitigating circumstances. One of the aggravating circumstances is that the defendant previously committed another felony involving the use or threat of violence or creating a substantial risk of death or serious physical injury to another. One of the mitigating circumstances is that the defendant has no significant history of prior criminal activity.

In the penalty case of Ford's trial the state was permitted to introduce evidence of prior convictions that did not involve the use or threat of violence or the risk of death or serious injury to another. A trial judge permitted the introduction of that evidence so the jury could not find as a mitigating circumstance that the defendant had no significant history of prior criminal activity.

In permitting the introduction of the evidence for that purpose, the trial judge violated the rule laid down in Miller v. State, 269 Ark. 341, 605 S.W.2d 430 (1980). The Arkansas Supreme Court explained in that case that the proper way to

handle a situation such as that in the Ford case was for the judge not to submit any aggravating or mitigating circumstance to the jury if it was completly unsupported by any evidence. Since Ford admittedly had been convicted of offenses in the past, the judge should not have submitted to the jury the mitigating circumstance that he had no significant history of prior criminal activity. If the judge had refrained from submitting that mitigating circumstance, there would have been no need to permit introduction of evidence about Ford's prior criminal activity. As with the evidence about prior convictions that were introduced in the guilt phase of the trial, the State was permitted to inject Ford's previous criminal record into his trial for a separate offense. The introduction of that evidence prevented Ford from receiving a fair trial on sentencing. The associate justice who dissented from the decision of the Arkansas Supreme Court noted that he was disturbed about this violation of Ford's rights. 276 Ark. 115.

4. Whether the right of the defendant to equal protection of the law as guaranteed by the Fourteenth Amendment and his right not to be subjected to cruel and unusual punishment as guaranteed by the Eighth and Fourteenth Amendments were abridged by the operation of a criminal justice system that results in the sentencing of a disproportionate number of blacks to the death penalty.

Clay Anthony Ford is black. Blacks constitute 11.7 per cent of the population of the United States according to the 1980 census. Of the 1058 inmates currently under sentence of death in the United States, 446, or 42 per cent are black. The death penalty falls with unequally heavy weight on blacks. There can be no explanation of that phenomenon other than that the operation of the criminal justice system deprives blacks such as Clay Anthony Ford equal protection of the law, as guaranteed by the Fourteenth Amendment, at least in so far as the imposition of the death penalty is concerned. Moreover,

the death penalty invoked in a higher percentage of cases involving white victims than in cases involving black victims. If the death penalty is a deterrent, it is not used to deter violence against blacks. If it expresses the demand of the community for justice, justice for black victims is not demanded. Pierce Bowers, "Arbitrariness and Discrimination under Post-Furman Capital Statutes," Journal of Crime and Delinquency, October 1980, p. 563; Zeisel, "Race Bias in the Administration of the Death Penalty," 95 Harvard Law Review 456. To inflict a punishment that is meted out so unequally and arbitrarily is cruel and unusual and a violation of the Eighth Amendment, as applied to the states through the Fourteenth Amendment.

CONCLUSION

This petition for a writ of certiorari to the Supreme Court of Arkansas should be granted and the decision of that court reversed. This Court should set the matter for oral argument on the issues discussed above.

Respectfully submitted,

Patrick J. Goss
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Little Rock, Arkansas 72201
(501) 371-0808

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing petition for writ of certiorari has been served on the respondent by mailing a copy of it to the attorney for the respondent, the Honorable Steve Clark, Arkansas Attorney General, Justice Building, State Capitol Grounds, Little Rock, Arkansas 72202, to the attention of Ms. Leslie Powell, Assistant Attorney General.

Patrick Goss

Patrick Goss

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

CLAY ANTHONY FORD — PETITIONER

vs. NO. 82 5378

STATE OF ARKANSAS — RESPONDENT

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The petitioner, Clay Anthony Ford, moves for leave to file this petition for writ of certiorari without payment of costs and to proceed in forma pauperis. Attached is his affidavit in support of the request. The petitioner was granted leave to proceed in forma pauperis on his appeal to the Arkansas Supreme Court.

WRIGHT, LINDSEY & JENNINGS
2200 Worthen Bank Building
Little Rock, Arkansas 72201
(501) 371-0808

By Patrick J. Goss
Patrick J. Goss
Attorneys for the Petitioner

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing petition for writ of certiorari has been served on the respondent by mailing a copy of it to the attorney for the respondent, the Honorable Steve Clark, Arkansas Attorney General, Justice Building, State Capitol Grounds, Little Rock, Arkansas 72202, to the attention of Ms. Leslie Powell, Assistant Attorney General.

Pat Goss
Pat Goss

IN THE
SUPREME COURT OF THE UNITED STATES

CLAY ANTHONY FORD, Petitioner, v. STATE OF ARKANSAS, Respondent	Case No. _____ AFFIDAVIT IN SUPPORT OF REQUEST TO PROCEED IN FORMA PAUPERIS

STATE OF ARKANSAS)
)
COUNTY OF LINCOLN)

I, Clay Anthony Ford, being first duly sworn, depose and say that I am the petitioner in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor, and that I believe that I am entitled to relief.

I further swear that the responses which I have made to questions and instructions below are true.

1. Are you presently employed?

Yes_____ No✓

a) If the answer is "yes" state the amount of your salary or wages per month, and give the name and address of your employer.

_____

b) If the answer is "no" state the date of last employment and the amount of salary and wages per month which you received.

Early 1980 - $100.00 xx per week

2. Have you received within the past twelve months any money from any of the following sources?

a) Business, profession, or form of self-employment?
Yes___ No ✓

b) Rent payments, interest, or dividends?
Yes___ No ✓

c) Pensions, annuities or life insurance payments?
Yes___ No ✓

d) Gifts or inheritances?
Yes ✓ No___

e) Any other sources?
Yes___ No ✓

If the answer to any of the above is "yes" describe each source of money and state the amount received during the past twelve months. Approximately $100.00 xx From family & friends for spending money

3. Do you own cash, or do you have money in checking or savings accounts? (Including any funds in prison accounts.)

Yes ✓ No___

If the answer is "yes" state the total value of the items owned.

$30.00 xx in prison account. Only assets

4. Do you own any real estate, stocks, bonds, notes, automobiles or other valuable property (excluding ordinary household furnishings and clothing)?

Yes____ No ✓

If the answer is "yes" describe the property and state its approximate value.

5. List the persons who are dependent on you for support, state your relationship to those persons and indicate how much you contribute to their support.

None

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Clay Anthony Ford

CLAY ANTHONY FORD

STATE OF ARKANSAS)
)ss
COUNTY OF LINCOLN)

Clay Anthony Ford, being first duly sworn under oath, presents that he has read and subscribed to the above and states that the information therein is true and correct.

Clay Anthony Ford
CLAY ANTHONY FORD

Subscribed and sworn to before me
this 27th day of July, 1982.

Clyde A Collins
NOTARY PUBLIC

My commission expires:
My Commission Expires 9/6/82

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his right to do so on appeal. Rule 50 (e), ARCP, Ark. Stat. Ann., Vol. 3A (Repl. 1979); *Kansas City Southern Railway Co.* v. *Short*, 75 Ark. 345, 87 S.W. 640 (1905). This rule is equally applicable to non-jury trials. *See Doup* v. *Almand*, 212 Ark. 687, 207 S.W.2d 601 (1948).

Rule 59 (a), ARCP, Ark. Stat. Ann., Vol. 3A (Repl. 1979), lists insufficient evidence as a basis for a motion for a new trial and states:

> On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

It is clear from this language that the sufficiency of the evidence may be raised in a motion for a new trial in non-jury trials. We have repeatedly held that this Court will not consider error raised for the first time on appeal. *Wicks* v. *State*, 270 Ark. 781, 606 S.W.2d 366 (1980).

Clay Anthony FORD v. STATE of Arkansas

CR 81-104

Supreme Court of Arkansas
Opinion delivered May 10, 1982

1. CRIMINAL LAW — DEATH PENALTY CONSTITUTIONAL. — Arkansas' death penalty statute is constitutional with regard to the Eighth Amendment prohibition against cruel and unusual punishment.
2. CRIMINAL LAW — STATUTORY OVERLAP NOT UNCONSTITUTIONAL. — The overlapping provisions of Ark. Stat. Ann. § 41-1501 (Repl. 1977) with Ark. Stat. Ann. §§ 41-1502 and 41-1503 (Repl. 1977) are not unconstitutional because there is no impermissible uncertainty in the definition of the offense.

5. CRIMINAL PROCEDURE — "DEATH QUALIFIED" JURY CONSTITUTIONAL. — The "death qualified" jury is constitutional.
4. CRIMINAL PROCEDURE — JURY SELECTION — NO GUARANTEES OF ANY PROPORTIONATE NUMBER OF APPELLANT'S RACE ON A JURY. — The jury wheel random selection process used here does not guarantee that a proportionate cross-section of the community will serve on the jury nor is there a guarantee that any proportionate number of appellant's race will be seated on the jury.
5. CRIMINAL PROCEDURE — JURY SELECTION — NOT REVERSIBLE ERROR FOR DEFENSE COUNSEL TO REQUEST TO VOIR DIRE JURY AND ACCEPT OR REJECT THEM BEFORE THE STATE AFTER CONSULTATION WITH APPELLANT. — It is reversible error to require a defendant to examine all of the jurors drawn from a panel each time before the state is required to either accept or reject a juror, it being felt that this process would afford an unfair advantage to the state; however, when defense counsel, after consulting with the appellant, requested this process and only used ten of his twelve peremptory challenges, there is no reversible error.
6. CRIMINAL PROCEDURE — JURY SEQUESTRATION IN COURT'S DISCRETION. — Although it may be preferable to sequester the jury, it is a matter for the trial court to decide, and the burden of proof is on the appellant to show he did not receive an impartial trial because of failure to sequester the jury.
7. EVIDENCE — RELEVANCY IS IN COURT'S DISCRETION. — Relevancy of evidence is within the trial court's discretion and absent a showing of abuse of that discretion its decision will be affirmed.
8. EVIDENCE — PRIOR CONVICTIONS ADMISSIBLE TO SHOW INTENT. — Prior convictions cannot be introduced for the purpose of showing the accused to be a man of bad character likely to commit the crime charged, but such evidence may be admitted for the purpose of showing intent. [Ark. R. Evid. Rule 404 (b).]
9. CRIMINAL PROCEDURE — STRIKING AN OBJECTIONABLE JUDICIAL STATEMENT CURED IMPROPRIETY. — There was no reversible error where the trial judge made a cautionary statement to the jury, defense counsel objected, and the statement was stricken.
10. EVIDENCE — NOT ERROR TO ALLOW WITNESSES TO IDENTIFY STOLEN PROPERTY FOUND WITH DEFENDANT BUT UNRELATED TO CRIME CHARGED IF ADMITTED TO SHOW INTENT. — The trial court did not abuse its discretion in allowing witnesses to identify stolen property, found in the defendant's possession, unrelated to the crime charged where such evidence was allowed in order to show motive or intent.

11. CRIMINAL LAW. — PREMEDITATION AND DELIBERATION MAY BE FORMED ALMOST ON SPUR OF THE MOMENT. — Premeditation and deliberation are not required to exist for any particular length of time and may be formed almost on the spur of the moment.

12. TRIALS — CLOSING ARGUMENT CONTENTS. — Closing arguments should be confined to the questions in issue, the evidence introduced and all reasonable inferences and deductions that may be drawn therefrom.

13. TRIALS — REFUSAL OF COURT TO LISTEN TO TRANSCRIPT. — Where the court admitted not hearing a certain portion of the argument but inquired as to what was said, and there was no dispute about what he was told, it was not prejudicial error for the court to refuse to listen to the reporter's transcript.

14. CRIMINAL LAW — AGGRAVATING CIRCUMSTANCES. — It was error for the court to allow evidence of prior crimes which did not involve the use or threat of violence or create substantial risk of death or serious physical injury to another person as an aggravating circumstance.

15. CRIMINAL LAW — MITIGATING CIRCUMSTANCES. — Prior felonies were not properly admitted for the purpose of anticipating a showing of lack of prior convictions as a mitigating circumstance.

16. CRIMINAL LAW — AGGRAVATING AND MITIGATING CIRCUMSTANCES. — Where the jury did not find the appellant had committed the aggravating circumstance of having a prior felony involving the use or threat of violence to another person nor the mitigating circumstance that appellant had no significant history of prior criminal activity, there was no prejudice to the defendant when the court allowed evidence of prior non-violent crimes to be admitted.

17. TRIALS — PUBLIC TRIAL GUARANTEED. — Public trials are guaranteed by law, therefore a request that the court be closed to the press was properly denied.

18. TRIALS — ACCUSED MUST CONSENT TO CAMERAS IN THE COURTROOM. — Canon 3 (a) (7) of the Code of Judicial Conduct prevents cameras in the courtroom without the consent of the accused; however, where the trial was completed and the only thing left to do was to sentence appellant and only one sentence was to be imposed, there was no prejudice to the appellant as a result of coverage by the media without prior consent.

19. CRIMINAL PROCEDURE — NEW TRIAL MOTION REQUIREMENT. — A motion for new trial should include a statement that the movant believes the action to be meritorious and is not offered for the purpose of delay. [A.R.Cr.P. Rule 36.22.]

Appeal from Mississippi Circuit Court; *Gerald Pearson*, Judge; affirmed.

Ken Cook, Deputy Public Defender, for appellant.

Steve Clark, Atty. Gen., by: *Leslie M. Powell*, Asst. Atty. Gen., for appellee.

JOHN I. PURTLE, Justice. The appellant was convicted of the crime of capital felony murder in Mississippi County Circuit Court, on a change of venue from Crittenden County. Punishment was set at death by electrocution. Appellant argues twelve points for reversal, which will be set out and discussed separately. However, we do not find reversible error in any of them and affirm the action of the trial court.

The facts in this case reveal that Sergeant Glen Bailey of the Arkansas State Police encountered the appellant driving at a highly excessive rate of speed. The officer crossed over the highway median in order to give chase and radioed for assistance. Appellant was stopped at a blockade on the exit ramp from Interstate Highway 55 into the city of Marion, Arkansas. Two police cars were in front of him and he stopped a short distance before reaching the first car. A uniformed trooper started walking toward the appellant who began to back up but discovered the original officer had blocked him in from behind and was approaching him on foot. Appellant stopped his car, got out and fired point blank into Sergeant Bailey's chest critically wounding him. The officer died soon thereafter as a result of this wound. The appellant attempted to escape on foot but was apprehended a short time later in a nearby house. At the scene the officers determined that the vehicle appellant had been driving was stolen. They found a number of stolen articles in the vehicle. They further learned that appellant was an escapee from the Tennessee Department of Correction where he had been serving time for a number of felony convictions.

The incident was given wide publicity resulting in the court granting appellant's motion for a change of venue from Crittenden County to Mississippi County.

Over the objections of the appellant the fact that he was an escapee and serving time on the other sentences was allowed to be introduced. Also, it was shown that the automobile was stolen and that various items found in the car belonged to other people. The owners were allowed to identify their property during the course of the trial. The information was also challenged and the more standard defenses normally presented in capital felony trials were argued.

We will separately discuss the arguments on appeal.

I.

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO QUASH THE INFORMATION.

The motion to strike the indictment was based upon the Eighth Amendment prohibiting cruel and unusual punishment. This argument has been presented to the court in many cases, and we have consistently ruled that our death penalty statute is constitutional. *Westbrook* v. *State*, 265 Ark. 736, 580 S.W.2d 702 (1979); *Ruiz and Van Denton* v. *State*, 265 Ark. 875, 582 S.W.2d 915 (1979); *Swindler* v. *State*, 264 Ark. 107, 569 S.W.2d 120 (1978); and *Collins* v. *State*, 261 Ark. 195, 548 S.W.2d 106 (1977). Appellant contended that the overlapping provisions of Ark. Stat. Ann. § 41-1501 (Repl. 1977) with Ark. Stat. Ann. §§ 41-1502 and 41-1503 (Repl. 1977) were arbitrary and discriminatory. We have also held constitutional these particular statute sections in *Wilson* v. *State*, 271 Ark. 682, 611 S.W.2d 739 (1981), and in *Cromwell* v. *State*, 269 Ark. 104, 598 S.W.2d 733 (1980), where it was stated "... we find no constitutional infirmity in the overlapping of the two sections, because there is no impermissible uncertainty in the definition of the offenses."

II.

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION CHALLENGING THE DEATH QUALIFICATION VOIR DIRE OF PROSPECTIVE JURORS.

The "death qualified" jury was approved by the United States Supreme Court in *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968). Since *Witherspoon* we have approved this procedure in many cases. See *Ruiz and Van Denton* v. *State*, supra; *Collins* v. *State*, supra; and *Westbrook* v. *State*, supra.

III.

THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT'S MOTION TO QUASH THE JURY PANEL.

The jury panel was selected by the jury wheel through a random selection process. The selection was by computer process from the list of registered voters of a voting district within Mississippi County. Additionally, prior to this trial, 300 names were again selected using the same process of jury wheel random selection. The court requested that 150 of the jurors report on the first day. Only 54 appeared. Five or six of these were black. The trial court excused a considerable number of jurors prior to the trial date. Eighteen were excused because they were 65 or older and did not wish to serve; 16 stated they were in bad health; and 12 others listed various hardships which caused the court to excuse them prior to the trial date. Several had moved from the district and a few of them were dead. There was nothing about this process which indicated an intent not to have a fair cross-section of the population of the district represented by the panel. Appellant's attorney made the statement that the state had a habit of excusing black jurors peremptorily. The panel as selected was all white. Although this could give the impression of discrimination, a closer examination reveals the selection was not in violation of the rule set out in *Swain* v. *Alabama*, 380 U.S. 202 (1965), and followed by us in *Williams* v. *State*, 254 Ark. 799, 496 S.W.2d 395 (1973). Appellant did not use the process utilized in *Waters & Adams* v. *State*, 271 Ark. 53, 607 S.W.2d 336 (1980), wherein we held the system used therein was discriminatory. There is no proof in the record that there was a conscious effort to exclude black jurors. Statistics concerning the number of blacks in Mississippi county were not presented until the appeal brief was filed. The random selection process used in this case does not guarantee that a proportionate cross-section of the

community will serve on the jury nor is there a guarantee that any proportionate number of appellant's race will be seated on the jury. *Swain* v. *Alabama*, supra; and *Williams* v. *State*, supra. If it had been shown that it was the practice of the state to automatically exclude black jurors the result may well have been different, however there was no proof as to this point.

IV.

THE TRIAL COURT ERRED BY REQUIRING DEFENDANT TO VOIR DIRE THE PROSPECTIVE JURORS BEFORE THE STATE WAS REQUIRED TO ACCEPT OR STRIKE.

Appellant sought to have the prospective jurors voir dired separately. However, the court found that there was not enough room in the courthouse to utilize this process. Although appellant thought the library in the courthouse would be adequate for this purpose, the court exercised its discretion in rejecting this suggestion.

In *Clark* v. *State*, 258 Ark. 490, 527 S.W.2d 619 (1975), we held it reversible error to require a defendant to examine all of the jurors drawn from the panel each time before the state was required to either accept or reject a juror, it being felt that this process would afford an unfair advantage to the state. However, it appears that the appellant waived the requirements of Ark. Stat. Ann. § 43-1903 (Repl. 1977) by making the suggestion that this process would be satisfactory. It may be noted that this process was utilized at the request of defense counsel after consultation with appellant. We do not overlook the fact that appellant stated he still did not waive his objection to questioning the jurors other than individually. However, the agreement to use this method was made only after consulting with the appellant, and we do not find it to be reversible error. Also, only ten of the twelve authorized peremptory challenges were exercised by appellant. See *Crutchfield* v. *State*, 251 Ark. 137, 471 S.W.2d 361 (1971); and *Stroud* v. *State*, 169 Ark. 348, 275 S.W. 669 (1925).

V.

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO PROHIBIT JURY DISPERSAL.

It is hard to understand why this argument is presented when the appellant admits that such matters were within the discretion of the trial court. Although it may be preferable to sequester the jury, it is a matter upon which the trial court must decide. The burden of proof to show that the appellant did not receive an impartial trial because of failure to sequester the jury is upon the appellant. This burden was not met. Ark. Stat. Ann. § 43-2137 (Repl. 1979); *Nail* v. *State*, 231 Ark. 70, 328 S.W.2d 856 (1959); *Hutcherson* v. *State*, 262 Ark. 535, 558 S.W.2d 156 (1977).

VI.

THE TRIAL COURT ERRED BY ALLOWING THE MENTION OF APPELLANT'S PRIOR FELONY CONVICTIONS DURING THE STATE'S OPENING STATEMENT.

The statement made by the state was:

> Officer Brackin further continuing his investigation determined that at the time this occurred the defendant, Clay Anthony Ford, was wanted for an escape from the Memphis Community Service Center where he was serving a sentence of — completing a sentence of three years on convictions of burglary in the third degree, grand larceny and burglary in the second degree.

The court had taken into consideration the appellant's motion in limine prior to the commencement of the trial and had ruled that the state would be permitted in its case in chief to show that appellant was a prior convicted felon in regard to those convictions which he was serving at the time of his escape. Additionally, the court later held that these convictions were allowable for the purpose of showing intent. The court had made it clear that the motion in limine was granted as to any other convictions which the appellant may

have had. Since the proof showed that the appellant was serving time for these particular convictions prior to his escape, it is proper to refer to them in order to show motive or intent pursuant to Arkansas Uniform Rules of Evidence, Rule 404 (b). Relevancy of evidence is within the trial court's discretion and absent a showing of abuse of that discretion its decision will be affirmed. *Hamblin* v. *State*, 268 Ark. 497, 597 S.W.2d 589 (1980). The admissibility of evidence must necessarily be decided on a case by case basis. Intent can seldom, if ever, be shown by direct evidence and may be proven only from circumstantial evidence. *Smith* v. *State*, 264 Ark. 874, 575 S.W.2d 677 (1979). We do not interpret these offenses to be excluded under the theory set forth in *Alford* v. *State*, 223 Ark. 330, 266 S.W.2d 804 (1954). We still adhere to the principle that prior convictions cannot be introduced for the purpose of showing that the accused was a bad person. We hold to the rule that evidence of other crimes may not be introduced merely for the purpose of showing the accused to be a man of bad character likely to commit the crime charged. *Umbaugh* v. *Hutto*, 486 F.2d 904, cert. denied 94 S. Ct. (1978), 416 U.S. 690 (8th Cir. Ark. 1973). Since evidence of appellant's other crimes was introduced for a proper purpose, there was no prejudicial error in allowing this material to be introduced.

VII.

THE TRIAL COURT ERRED WHEN IT COMMENTED UPON THE EVIDENCE.

At the beginning of the trial the court stated to the jury, "Ladies and gentlemen, I feel that a word of caution might be in order at this time in regard to that type and nature of evidence which has been admitted." " . . . any prior convictions or escape from the State of Tennessee, of course, has no bearing upon the question of whether or not this defendant did in truth and fact shoot and kill Sgt. Glen Bailey." Appellant objected to the trial court's comment and at his request the trial court struck its previous remark. Even if the words of caution uttered by the judge had been improper, it is apparent that the court's prompt striking of the statement cured any impropriety. We do not find this to

be a violation of Art. 7 § 23 of the Constitution of Arkansas prohibiting judges from commenting upon the evidence. There is no doubt that a trial judge is in a position of great stature in the eyes of the jury and should be extremely cautious in both conversation and candor throughout the course of a trial. Without having any intention whatsoever and perhaps unconsciously the trial court could prejudice the right of an accused by making comments upon the evidence or appearing to act in a manner favoring one side or the other. However, we do not find that such is the case here.

VIII.

THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ALLOWED A SERIES OF STATE'S WITNESSES TO IDENTIFY STOLEN PROPERTY TAKEN IN THE COMMISSION OF OTHER CRIMES UNRELATED TO THIS CHARGE AND FOR WHICH THE APPELLANT HAD NOT BEEN CHARGED.

Exercising its discretion, the trial court, over the appellant's objection, permitted evidence of stolen credit cards and other articles found at the scene of the slaying, including the vehicle, to be introduced as evidence. As we stated earlier, Rule 404 (b), Arkansas Uniform Rules of Evidence, allows the judge to admit evidence that goes to show motive or intent. It is obvious the appellant would not have wanted to be apprehended with stolen articles in his possession. Therefore, we cannot say the trial court abused its discretion in allowing the introduction of this evidence for the purpose of shedding light upon the intent of the accused. Perhaps it is unfortunate that as a side effect of the introduction of this evidence the jury could imply that appellant had committed these other crimes. However, the trial court obviously ruled that its probative value outweighed the danger of unfair prejudice. *Martin* v. *State*, 258 Ark. 529, 527 S.W.2d 903 (1975); and *Grigsby* v. *State*, 260 Ark. 499, 542 S.W.2d 275 (1976).

IX.

THE EVIDENCE REGARDING PREMEDITATION

AND DELIBERATION WAS INSUFFICIENT AS A MATTER OF LAW AND THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION FOR DIRECTED VERDICT.

The jury was properly instructed by the court that in order to find the appellant guilty of capital felony murder they must find that he acted with a premeditated and deliberated purpose; that he had a conscious object to cause the death; that he formed that intention before acting; and, that he must have weighed in his mind the consequences of a course of conduct as distinguished from acting upon sudden impulse without the exercise of reasoning power. The matter of premeditation and deliberation, absent a confession, can only be proven by circumstantial evidence. This state of mind may be formed on the spur of a moment. The fact that appellant alighted from his car with his pistol in his hand and fired point blank into the approaching officer's chest is rather strong evidence of his intent. We stated in *Westbrook v. State*, supra, "premeditation and deliberation are not required to exist for any particular length of time and may be formed almost on the spur of a moment."

X.

THAT DEFENDANT WAS PREJUDICED BY THE STATE'S IMPROPER CLOSING ARGUMENT AND THE TRIAL COURT'S DENIAL OF DEFENDANT'S MOTION FOR A MISTRIAL.

During the state's closing arguments reference was made concerning the motive for killing the officer and in that connection the state made the statement that appellant was trying to avoid apprehension for "other crimes, the escape, the burglary, the theft and possession of stolen property." Appellant timely objected to the mention of these crimes but the court denied his motion for a mistrial. The court did instruct the state not to dwell at length upon this aspect of the case. All of these items had been mentioned both at the beginning of the case and further along in the proof in chief. Therefore, they were not prejudicial as mentioned in the closing argument. Closing argument

should be confined to the questions in issue, the evidence introduced and all reasonable inferences and deductions that may be drawn therefrom. *Brewer* v. *State*, 271 Ark. 254, 608 S.W.2d 363 (1980). We have previously stated that these particular crimes were admissible under Rule 404 (b). Therefore, it was not error to mention them in the closing argument.

Appellant contends that the trial court abused its discretion when, after admitting that the court had not heard a certain portion of the argument, the court refused to listen to the reporter's transcript in order to determine what had occurred. The court also denied a motion for a mistrial at this point. A review of the transcript shows that the judge inquired as to what was said and it turned out to be the remark of the prosecuting attorney relating to the other crimes. Neither side disputed that that was the portion of the proceeding which the court did not hear. Consequently it was not prejudicial error to refuse to listen to the tape.

XI.

THE TRIAL COURT ERRED BY ALLOWING THE STATE TO INTRODUCE EVIDENCE OF APPELLANT'S PRIOR CONVICTIONS DURING THE PENALTY PHASE OF THE TRIAL.

The prior convictions admitted during the penalty phase were convictions for larceny, burglary and receiving and concealing stolen property. These are not the same crimes that were mentioned earlier but are convictions for which the appellant had been paroled or released. We agree with the appellant that as stated in *Williams* v. *State*, 274 Ark. 9, 621 S.W.2d 686 (1981), the trial court should not submit to a jury a defendant's conviction for burglary during the penalty phase of a trial. We held that in order for an offense to be admissible as an aggravating circumstance pursuant to Ark. Stat. Ann. § 41-1303 (Repl. 1977) the felony committed must include the use or threat of violence to another person, or the creation of substantial risk of death or serious physical injury to another person. Sometimes a burglary could include this risk. We still adhere to the rule.

It was error for the court to allow evidence of prior crimes which did not involve the use or threat of violence or create substantial risk of death or serious physical injury to another person as an aggravating circumstance. Neither were these prior felonies proper for the purpose of anticipating a showing of lack of prior convictions as a mitigating circumstance. We faced a similar situation in the case of *Miller* v. *State*, 269 Ark. 341, 605 S.W.2d 430 (1980), wherein we stated:

> We think it a better practice, and less confusing to the jury, for the circuit judge to omit from submission any aggravating or mitigating circumstances that are completely unsupported by any evidence, and we take this opportunity to direct the circuit judges of Arkansas to hereafter allow this alternate procedure. If there is any evidence of the aggravating or mitigating circumstances, however slight, the matter should be submitted to the jury. Of course, counsel may object to the determination of the trial court the same as they may object to any other form of verdict.

Therefore, it was the duty of the trial court to omit the mitigating circumstance relating to appellant's lack of prior criminal history. The jury could not have found it to exist and the appellant would not have these prior felonies presented before the jury. The fact that it was shown that appellant was an escapee from the Tennessee prison where he was serving time for felony convictions had already foreclosed the possibility of the jury finding no significant history of prior criminal activity. However, in the present case the jury did not find appellant had committed the aggravating circumstance of having a prior felony involving the use of or threat of violence to another person or involving the creation of substantial risk of death or serious physical injury to another person. Neither did the jury find the mitigating circumstance that appellant had no significant history of prior criminal activity. Under the circumstances of this case we do not find the error to have been prejudicial.

XII.

THE TRIAL COURT ERRED BY DENYING WITHOUT A HEARING APPELLANT'S MOTION FOR NEW TRIAL AND SUBPOENA DUCES TECUM AS A RESULT OF MEDIA COVERAGE OF TRIAL PROCEEDINGS IN THE COURTROOM WITHOUT CONSENT OF APPELLANT AND APPELLANT'S COUNSEL.

Appellant filed a motion for new trial based on a number of grounds. Most of the grounds were matters which were previously raised and ruled upon during the course of the trial. One other ground emphasized was that the trial court allowed TV and media coverage at the sentencing stage of the trial without the consent of appellant or appellant's counsel. In reviewing the record it is unclear how much media coverage this trial was given. Appellant's objection was made at the sentencing phase of the trial and thus it is with that point which we deal.

The court, after the case had been submitted to the jury and a verdict returned fixing appellant's penalty at death by electrocution, asked the appellant, "Do you have any legal cause to show at this time why sentence should not be passed?" At this point counsel for appellant requested that the court be closed ". . . insofar as the press is concerned." The trial court denied the request. In the case of *Shives and Arkansas Gazette Co. v. Britt*, 267 Ark. 97, 589 S.W.2d 18 (1979), we held that public trials are guaranteed by law, therefore the request that the court be closed to the press was properly denied. However, assuming that the appellant's counsel was referring to TV coverage, the record does not reveal the extent to which the proceeding was videotaped or covered by the television media. Canon 3 (a) (7) of the Code of Judicial Conduct prevents cameras in the courtroom without the consent of the accused. See 271 Ark. 358 (1980). Our rule has been somewhat relaxed since the date of this trial. The rule was not placed into effect to be ignored by the courts. It is possible that the rights of an accused could be prejudiced by intrusion by members of the media. Therefore, safeguards have been adopted by Canon 3 (a) (7) of the Code. A willful disobedience of this Canon would, no doubt,

be dealt with in an appropriate manner which could go so far as to cause a retrial of the case or result in other action by this court. Since the trial of the appellant had been completed and the only thing left to do was to sentence him and only one sentence was to be imposed, we cannot hold that there was any prejudice to the appellant as a result of coverage by the media without prior approval.

The trial court considered appellant's motion for a new trial and denied it on the grounds (1) that some of the matters had been previously considered and ruled upon, (2) that there was no timely objection in regard to media coverage of the trial, and (3) that appellant's motion for new trial failed to comply with Rule 36.22 of the Ark. R. Crim. Pro. which states that a motion for new trial " . . . should include a statement that the movant believes the action to be meritorious and is not offered for the purpose of delay." In light of the previous discussion and considering the trial court's reasoning, we cannot find that the trial court abused its discretion in failing to grant appellant a new trial.

XIII.

SEARCH FOR OTHER ERRORS.

In accordance with Ark. Stat. Ann. § 43-2725 (Repl. 1977) and Rule 11 (f) of our rules we have reviewed the record in this case regarding all objections upon which the trial court ruled adversely to the appellant but which were not included in the brief herein. We have found no overruled objections which amount to reversible error.

We would call appellant's attention to the fact that in a brief to this court the abstract should be done in first person and is not to be copied verbatim from the transcript. Rule 9 (d), Rules of the Supreme Court. This seems to have added to appellant's own, as well as our difficulty in coming to a full understanding of the case; however, we have proceeded with due diligence and find that the trial court should be affirmed.

Affirmed.

HICKMAN, J., dissents.

DARRELL HICKMAN, Justice, dissenting. The outcome of this trial was never seriously in doubt. Two eyewitnesses saw Clay Anthony Ford kill an Arkansas State Policeman in broad daylight, and the State had an abundance of other evidence which would justify any jury imposing the ultimate penalty. About all the defense could hope for in this case was to see that Ford obtained a fair trial. But the State, for some reason, had to go further and press its advantage. In my opinion it went too far. The jury was permitted to consider two items of evidence that were unnecessary, inadmissible and could only prejudice the jury.

First, it was unnecessary for the State to show what convictions Ford had that resulted in his imprisonment. These convictions were totally irrelevant to this case and inadmissible for any reason. Only the fact that he was an escapee who had been serving a sentence for a felony conviction was relevant. Evidently the trial court felt that such evidence went to motive. Weinstein defines motive as it applies in such instances as follows:

> Motive has been defined as 'supply[ing] the reason that nudges the will and prods the mind to indulge the criminal intent.' Two evidentiary steps are involved. Evidence of other crimes is admitted to show that defendant has a reason for having the requisite state of mind to do the act charged, and from this mental state it is inferred that he did commit the act. Evidence of another crime has been admitted to show the likelihood of defendant having committed the charged crime because he needed money, sex, goods to sell, was filled with hostility, sought to conceal a previous crime, or to escape after its commission.
> 2 WEINSTEIN'S EVIDENCE par. 404[4].

In no way can it be said evidence of what crimes the convictions were for provided Ford any motive for this crime. Only the fact that he was an escapee would be relevant to motive and that was admitted.

The State was also permitted to offer other prior convictions of Ford during the sentencing stage of the trial. These convictions were offered so the defense could not say in mitigation that Ford had no prior criminal record. These convictions were in addition to those mentioned in the opening statement by the prosecuting attorney that I addressed first. This was also prejudicial error in my judgment.

These prior convictions were not admissible as an aggravating circumstance authorized by Ark. Stat. Ann. § 41-1303 (3) (Repl. 1977) because none of them involved an element of which was the use or threat of violence, the risk of death or serious injury to another. The trial judge allowed the convictions so the jury would not find as a mitigating circumstance that the defendant had no significant history of prior criminal activity. Ark. Stat. Ann. § 41-1304 (6). In my judgment this was prejudicial error because the trial judge, when he learned of this prior criminal record, simply should not have submitted that mitigating circumstance to the jury. We held in *Miller* v. *State*, 269 Ark. 341, 605 S.W.2d 430 (1980) that the trial judge should omit any aggravating or mitigating circumstance that is completely unsupported by any evidence. We said:

> The aggravating and mitigating circumstances to be considered by the jury in all applicable cases are set out in the statute, and are therefore not worded or tailored to fit the particular facts of the case just tried. As the statute does not indicate otherwise, the circuit judges of the state have been submitting to the jury in capital murder cases all seven of the enumerated aggravating circumstances and all six of the enumerated mitigating circumstances, regardless of the inapplicability of some of them. Ark. Stat. Ann. § 41-1303 (Repl. 1977). The practice was perhaps also bolstered by our Committee on Criminal Jury Instructions, because none of the aggravating or mitigating circumstances are bracketed in the model instruction, to indicate they might be omitted. We think it a better practice, and less confusing to the jury, for the circuit judge to omit from submission any aggravating *or*

> *mitigating circumstances that are completely unsupported by any evidence*, and we take this opportunity to direct the circuit judges of Arkansas to hereafter allow this alternate procedure. [Emphasis added.]

The trial judge simply should not have permitted that particular mitigating circumstance to be considered by the jury. It amounts to allowing the State to show evidence of aggravation by these prior convictions; evidence that was not admissible as an aggravating circumstance.

The majority has approved by two new methods, heretofore unknown, the injection of a defendant's previous criminal record into his trial for a separate offense. Laymen often wonder why such evidence is excluded but lawyers and judges know very well why such evidence is traditionally excluded. Because it is their role to preserve our system of justice. In *Alford* v. *State*, 225 Ark. 330, 266 S.W.2d 804 (1954), we said:

> No one doubts the fundamental rule of exclusion, which forbids the prosecution from proving the commission of one crime by proof of the commission of another. The State is not permitted to adduce evidence of other offenses for the purpose of persuading the jury that the accused is a criminal and is therefore likely to be guilty of the charge under investigation. In short, proof of other crimes is never admitted when its only relevancy is to show that the prisoner is a man of bad character, addicted to crime.

That is exactly what the State was able to do in this case.

Ford should pay for the crime he committed, but our system cannot allow him to pay a price that is not fairly set by an impartial jury considering only relevant evidence in an atmosphere devoid of passion and prejudice.

I am also disturbed by the fact that the trial court did not comply with our rule on cameras in the courtroom. There is no evidence presented to us that the defendant was prejudiced because the trial court prohibited the defendant's

attorney from obtaining the video tapes in question. Since I would reverse for other reasons, I do not reach this issue.

Michael Dewayne JONES *v.* STATE of Arkansas

CR 82-44

Supreme Court of Arkansas
Opinion delivered May 10, 1982

1. CRIMINAL LAW — DETERMINING VALUE OF STOLEN PROPERTY — ORIGINAL COST RECOGNIZED AS ONE FACTOR. — Arkansas law recognizes the original cost of property as one factor the jury may consider in determining value, if not too remote in time and relevance. *Held:* Where the owner of stolen CB equipment testified that he bought it new two years before it was stolen, paid $219 for it, and some of it was on sale, this testimony amply supported the finding of the jury that the value of the property stolen was in excess of $100.
2. CRIMINAL LAW — RECEIPT OF STOLEN PROPERTY — PROOF REQUIRED. — In proving the offense of receipt of stolen property, it is not necessary that the State prove the accused had actual possession of the stolen property; it is enough to prove he had constructive possession or the right to control.
3. CRIMINAL LAW — CLAIM OF OWNERSHIP OF STOLEN PROPERTY, EFFECT OF. — Appellant's claim of ownership of property recently stolen provided the necessary element of proof to sustain the charge of possession of stolen property, absent a credible explanation for its presence.
4. TRIAL — MOTION FOR MISTRIAL — INSUFFICIENT CAUSE. — The testimony by a police officer that appellant was "subsequently arrested on a warrant" was not cause for a mistrial where there was no indication to the jury that the officer was referring to the arrest of appellant for a different offense.

Appeal from Pulaski Circuit Court, Fourth Division; *Harlan A. Weber*, Judge; affirmed.

James Michael Hankins, for appellant.

LAW OR CHANCERY MANDATE

STATE OF ARKANSAS,
In the Supreme Court } SCT.

BE IT REMEMBERED, That at a term of the Supreme Court of the State of Arkansas, begun and held at the Court Room in the City of Little Rock, on the 5th day, being the first Monday of October, A. D. 1981, amongst others were the following proceedings, to-wit:

On the 7th day of June, A. D. 1982, a day of said term

CLAY ANTHONY FORD

APPELLANT

No. CR81-104's.

STATE OF ARKANSAS

APPELLEE

Appeal from Mississippi Circuit Court, Chickasawba District

Petition for Rehearing is denied.

IN TESTIMONY, That the above is a true copy of the order of said Supreme Court, rendered in the case herein stated. I, Dona L. Williams, Clerk of said Supreme Court, hereunto set my hand and affix the Seal of said Supreme Court, at my office in the city of Little Rock, this 7th day of June, A.D. 1982.

Dona L. Williams
CLERK

By _____
D. C.